Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

ENTERPRISE VI,

Petitioner,

v.

BOONE COUNTY FISCAL COURT, BOONE COUNTY PLANNING COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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March 1995

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QUESTIONS PRESENTED

I. Does the interpretation and enforcement of a zoning ordinance which fails to set forth standards whereby a landowner may look at the zoning plan and reasonably anticipate the use to which the property may be put violate Due Process, Equal Protection and/or 42 U.S.C. §1983 as an improper vesting of absolute and arbitrary power?

II. Does a *First English*[1] taking occur when a local zoning ordinance on its face and as enforced allows no use for a specific tract of land until the owner submits a development plan which requires a standardless review process by the local legislative body?

III. When years pass after a use application is improvidently denied, will declaring an ordinance unconstitutional be a sufficient remedy in light of substantial loss of investment-backed expectations?

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[1] See *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987).

LIST OF PARTIES

Enterprise VI, a Kentucky General Partnership consisting of Albert J. Vesper III (also acting as Guardian of the Estate of Alicia Vesper), Ronald J. Vesper, Paul J. Vesper, Stephen J. Vesper, and Dennis J. Vesper ("Enterprise VI"), is the Petitioner.[2]

Erpenbeck Commercial Enterprises, Inc. ("Erpenbeck"), also a Movant below in a consolidated action, has elected to file a separate petition for writ of certiorari as provided by Supreme Court Rule 12.2.[3]

The Boone County Fiscal Court[4] ("Fiscal Court") and the Boone County Planning and Zoning Commission[5] ("Planning Commission") are the Respondents.

On the questions presented, the aforementioned parties and the parties to the proceedings below are identical.

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[2] Enterprise VI is the owner of 264 acres of undeveloped land ("tract") which is located in Boone County, Kentucky. The tract is adjoined on one side by the Greater Cincinnati-Northern Kentucky International Airport and a four-lane state highway on the other.

[3] Erpenbeck is a commercial builder who contracted with Enterprise VI to develop the tract for use as a retail shopping center.

[4] The Fiscal Court is the chief body with legislative authority in the county where the tract is located.

[5] The Planning Commission is the body authorized to propose plans for adoption by the Fiscal Court relating to the controlled future growth, preservation and development in the county where the tract is located, and is also designated as the first of the two governmental bodies to hear proposals for use permits.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

A. Statement of the Facts 3

B. Procedural History 7

REASONS FOR GRANTING THE PETITION 8

I. Conflict exists between the states 8

II. Standardless zoning goes "too far" 8

III. The failure to provide a landowner with advance notice whereby he can look at the zoning plan and reasonably anticipate the use to which the property may be put is a vesting of absolute and arbitrary power 9

IV. Allowing no use for a specific tract of land until an owner submits a development plan subject to a standardless review process is a compensable regulatory taking and goes "too far" 12

V. Declaring an ordinance to be unconstitutional, years after the improvident denial of a use application, is an insufficient remedy and compensatory damages must be awarded 13

CONCLUSION 14

TABLE OF CONTENTS – Continued

Page

APPENDIX –

Kentucky Court of Appeals Opinion Affirming Judgment of the Boone Circuit Court 1a

Boone Circuit Court Opinion and Order Granting Defendants Summary Judgment..... 15a

Kentucky Court of Appeals Order Denying Petition for Rehearing..... 29a

Kentucky Supreme Court Order Denying Discretionary Review 31a

Enterprise VI's Amended Complaint 32a

Deposition excerpts of Respondent Boone County ... 55a

TABLE OF AUTHORITIES

Page

U.S. SUPREME COURT CASES:

Armstrong v. United States, 364 U.S. 40 (1960).....8, 12

Connally v. General Const. Co., 269 U.S. 385 (1926)..8, 11

Euclid v. Amber Realty Co., 272 U.S. 365 (1926).....8, 10

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 12, 13

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 10

New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co., 439 U.S. 96 (1978) 9

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), *reh. denied*, 439 U.S. 883 (1978) 9

PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, *cert. granted in part*, ___ U.S. ___, 112 S. Ct. 414, *cert. dismissed*, 503 U.S. 257, 112 S. Ct. 1151 (1992) 9

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 12

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 9

Young v. American Mini Theatres, Inc., 427 U.S. 50, *reh. denied*, 429 U.S. 873 (1976)..... 8

STATE SUPREME COURT CASES:

Anderson v. City of Issaquah, 70 Wash. App. 64, 851 P.2d 744 (1993) 8

City of Buford v. Ward, 212 Ga. App. 752, 443 S.E.2d 279 (1994) 8

TABLE OF AUTHORITIES – Continued

Page

U.S. CONSTITUTIONAL PROVISIONS:

Fifth Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

STATUTORY PROVISIONS:

28 U.S.C. §1257 2

42 U.S.C. §1983 ..... 3, 14

42 U.S.C. §1988 3

ORDINANCE:

Boone County Zoning Ordinance, Chapter 15 4

No. _____

In The

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October Term, 1994

ENTERPRISE VI,

Petitioner,

v.

BOONE COUNTY FISCAL COURT, BOONE COUNTY PLANNING COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court to grant a writ of certiorari to the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The Opinion of the Boone Circuit Court granting Defendants summary judgment and the Opinion of the Kentucky Court of Appeals denying petition for rehearing and affirming the judgment of the Boone Circuit Court are unreported. Those Opinions, as well as the

Order of the Supreme Court of Kentucky denying discretionary review are reprinted in the Appendix and appear at pages 15a, 1a, and 31a respectively.

JURISDICTION

Petitioner has been made to sustain substantial financial losses as a result of the interpretation and enforcement of Respondents' zoning ordinance – an ordinance which Petitioner contends, is transgressive of a landowner's federal constitutional and statutory right to receive compensation whenever a regulation goes "too far" and leaves a landowner no use for its land. The Supreme Court of Kentucky entered its judgment on December 14, 1994 (App., *infra*, 1a). This Petition has been filed within 90 days after the entry of said judgment. This Court has jurisdiction to review the final judgment on a petition for certiorari pursuant to 28 U.S.C. §1257. Therefore, the jurisdiction of this Court is properly invoked.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT

> "No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FOURTEENTH AMENDMENT

"Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws shall be liable to the party injured and in action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1988 provides:

"In any action . . . to enforce . . . 42 U.S.C. §1983, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

A. Statement of the Facts

Adoption of a Zoning Ordinance.

In 1986, the Planning Commission researched and presented a zoning ordinance to the Fiscal Court which

changed the zoning of Enterprise VI's tract from Industrial 1 ("I-1") to Commercial 2 ("C-2")/Planned Development ("P.D.") zone. P.D. zoning was created as an "alternate amendment process" to allow for mixed uses and increased densities within an underlying zone.[6] Thus, the C-2/P.D. which allowed for a base line C-2/ Commercial Development became subject to a layer of regulatory review which applied to any and all uses that might be proposed. This proposed zoning ordinance was ultimately adopted by the Fiscal Court.

The Review Process was Admittedly Standardless and Arbitrary.

The record below contains the deposition of the "designated deponent" of the Respondent questioned regarding the interpretation and enforcement of the zoning ordinance. Respondent testified that the P.D. zone overlay permitted no use for property until approval was sought and obtained at its discretion.

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[6] Specifically, §1504 of the zoning ordinance provides that: "The Planning Commission shall require that a Concept Development Plan be submitted for property located in a Planned Development zone. The Concept Development Plan may be filed to the Planning Commission by the *owner(s), owner by contract (option) or lessee of property* for which the planned development is proposed. . . . " (Emphasis supplied).

In this case, even though the zoning ordinance specifically required the *property owner* to request the P.D. "overlay" zone to be placed on its property, it was the *Respondents* that placed the overlay zoning on Enterprise VI's property without the application process required by their own zoning ordinance.

The Respondent was asked:

Q. Now if a person wants to use a piece of property that is zoned P.D., are there any principally permitted uses in the Boone County planning ordinance, excuse me, in the Boone County ordinance?

A. No.

* * *

Q. Okay, a piece of property in Boone County is zoned C-2 P.D. under the current zoning ordinance therefore you would agree with the statement, has no principally permitted uses without further action from the Boone Fiscal Court?

A. Yes.

(Respondent Boone County Dep., App., *infra*, at 55a-62a.)

Loss of Investment-Backed Expectations.

In 1989, Enterprise VI and Erpenbeck entered a purchase contract in which Erpenbeck was to sell a portion of the tract to HyperShoppes, Inc. ("Hyper") for a Biggs department store. Erpenbeck contracted to buy the 264 acre tract from Enterprise VI for approximately $27,000 per acre. At the same time, Erpenbeck entered into a contract to sell 43 acres of the tract to Hyper who planned to construct a Biggs Department Store on the site at a price of $120,000 per acre.

Erpenbeck initially sought ministerial approval of the plan pursuant to Article 14 because, in the absence of the P.D. overlay, the uses proposed were entirely consistent

and allowed as a matter of right in the C-2 zone. However, ministerial approval was denied as a result of the County Official Policy and interpretation of Article 15.

For purposes of mitigating its damages and exhausting any available administrative remedies, Erpenbeck filed an application with the Planning Commission on November 1, 1989, for concept development plan approval of the Biggs project under the C-2/P.D. zone. The Planning Commission recommended rejection on January 3, 1990. The reasons for rejection included potential traffic problems and incompatibility with the 1986 Comprehensive Plan. On January 11, 1990, Hyper terminated its contract with Erpenbeck, citing the Planning Commission's denial as reason for termination.[7]

The Effect of P.D. Zoning.

Enterprise VI was required to undergo a legislative review process before any underlying development would occur, even though its development plan was consistent with the C-2 underlying zone. Enterprise VI has maintained in all the courts below that a property owner with a P.D. overlay in Boone County has no permitted use for his property unless he receives legislative approval from the Fiscal Court. *The effect of such a requirement meant that Enterprise VI was required to obtain an amendment to the law in order to use its property.*

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[7] Without being exercised, Erpenbeck's option to purchase Enterprise VI's property expired on February 1, 1990. The Fiscal Court decided on February 6, 1990, to uphold the Planning Commission's decision and formally deny Erpenbeck's application for the Biggs project.

B. Procedural History

This case presents a post-enforcement facial challenge to a zoning ordinance on the ground that it violates the federal constitution and federal law. Petitioners brought an action in the Boone Circuit Court maintaining that Respondents' interpretation of their own zoning ordinance is: (i) inconsistent with a fair reading of Article 15 of the ordinance; (ii) inconsistent with state zoning law; (iii) results in violation of federal and state constitutional law provisions by taking of property without just compensation as well as denial of due process; and (iv) caused monetary losses to Petitioners. (App., *infra*, 38a-54a).

The trial court thereafter dismissed all of Petitioners federal and state constitutional claims, federal and state statutory claims and common law tort actions by granting summary judgment in favor of Respondents. The Court of Appeals sustained on a split decision. For his dissent, Special Court of Appeals Judge Vance, found and concluded:

> "I respectfully dissent from the majority opinion which affirms the Summary Judgment entered by the trial court. I would hold that the Commercial 2 ("C-2") Planned Development ("PD") zone violates the constitution of Kentucky, because it contains no standards from which it can be ascertained whether or not a proposed development is entitled to approval or disapproval, and thus, approval or disapproval of any proposed development is left entirely to the arbitrary discretion of the members of the Fiscal Court." (App., *infra*, 13a).

After motions to vacate were filed, the trial court entered a final order from which appeal has been taken. The Kentucky Court of Appeals affirmed the decision of the trial court without a rehearing. The Supreme Court of Kentucky subsequently denied discretionary review.

REASONS FOR GRANTING THE PETITION

I. Conflict exists between the states.

As evidenced by the instant case, Kentucky allows standardless review of use permits. Other state courts are declaring that development conditions which require standardless review violate the federal constitution as interpreted by this Court. See *Anderson v. City of Issaquah*, 70 Wash. App. 64, 851 P.2d 744, 751 (1993) (citing *Connally v. General Const. Co.*, 269 U.S. 385, 391); see also *City of Buford v. Ward*, 212 Ga. App. 752, 443 S.E.2d 279 (1994). Hence, the supreme law of the land is not being applied uniformly in the states.

II. Standardless zoning goes "too far".

Under the standardless zoning ordinance proposed and adopted by Respondents, no permitted use existed for Enterprise VI's land until it sought and obtained an amendment to the law. In the years since *Euclid*, "zoning has become an accepted necessity in our increasingly urbanized society." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 74, *reh. denied*, 429 U.S. 873 (1976). Indeed, Petitioner will readily concede that the Respondents have the authority to interpret and enforce zoning ordinances

and that those ordinances are, generally to be afforded a presumption of validity when attacked. *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). However, when the exercise of the municipality's authority conflicts with liberties protected by the Constitution and federal law, the usual presumption of validity must fail. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

No doubt our cities should be made beautiful and orderly to the highest extent permissible under the law. Unfortunate for Kentucky landowners, however, the degree of communal control has progressed to standardless zoning.[8] Thus, the Court now has an opportunity to decide whether the exercise of standardless zoning abrogates protections afforded by the Fifth and Fourteenth Amendments, as well as federal law.

III. The failure to provide a landowner with advance notice whereby he can look at the zoning plan and reasonably anticipate the use to which the property may be put is a vesting of absolute and arbitrary power.

No permitted use for Enterprise VI's land existed until it sought further legislative approval. Yet, discretionary zoning is the antithesis of land use control. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978),

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[8] This Court authorized the briefing of essentially the same issue in the *PFZ Properties* case, but eventually dismissed the issuance of certiorari as being improvidently granted. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, *cert. granted in part*, ___ U.S. ___, 112 S. Ct. 414, *cert. dismissed*, 503 U.S. 257, 112 S. Ct. 1151 (1992).

reh. denied, 439 U.S. 883 (1978). Governmental regulation must be accompanied by methods consistent with due process with its touchstone being the protection of the individual against arbitrary action of government; the guarantee of due process demands that a zoning regulation bear substantial relation to the purpose of the control. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

This Court declared in its landmark zoning case that an ordinance which is arbitrary, unreasonable and without substantial relation to the public health, safety, morals or general welfare shall be deemed unconstitutional. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926). Regardless of the deference normally accorded zoning practices by the courts, the Constitution does not tolerate arbitrary and unreasoned legal requirements.

In the case at bench, no standards existed for the P.D. overlay zoning. Respondents even testified that the P.D. zone overlay in question permitted no use of property until approval was sought and obtained from it in a highly discretionary procedure. Here, Respondents were able to convince the courts below that as long as they could fashion some reason that advanced a state interest for denying a use permit, it may reject the argument that the ordinance on its face and as applied was arbitrary.[9] However, such an approach ignores the fact that the ordinance was standardless from the start. "After-the-

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[9] In order to reject Petitioners' argument, the Kentucky Court of Appeals reasoned that: "The record reflects that a lot of careful thought and analysis went into the Planning Commission's recommendations about the Biggs proposal." (App., *infra*, at 7a).

fact" and discretionary zoning subverts the very tenets of land use control and due process. An ordinance which requires a landowner to ask permission prior to using its land, especially where the proposed use is entirely consistent with the underlying zone, amounts to nothing more than a "Mother May I?" situation where the zoners and planners may arbitrarily and capriciously deny the request so long as they can devise some "reason" to support their finding. Under such a scheme, a landowner clearly has no notice whereby it can look at a zoning plan and reasonably anticipate the use to which its property may be put.

The ordinance in question must fail because "men of common intelligence must necessarily guess at its meaning". See *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). The "void for vagueness" doctrine requires fair warning and non-discriminary enforcement. Vague laws provide opportunity for arbitrary and discriminatory enforcement since those who apply the rules have no clear and explicit standards to guide them. Thus, due process requires that restrictions made by zoning regulation not be unreasonable, arbitrary, or capricious. Hence, the ordinance, as interpreted and applied, was admittedly arbitrary, and therefore patently offensive to the guarantees of due process.

IV. Allowing no use for a specific tract of land until an owner submits a development plan subject to a standardless review process is a compensable regulatory taking and goes "too far".

The Fifth Amendment provides, in relevant part, that "private property [shall not] be taken for public use, without just compensation." Although this provision is generally not construed to prohibit the government from taking private property for governmental purposes, it places a specific condition on the exercise of that power. It is well-settled that the cost of governmental interference with property rights which works a taking necessarily implicates the "constitutional obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40 (1960). It is axiomatic that the Just Compensation Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.*

On deciding the issue of when regulations go "too far", this Court has previously reasoned that "temporary takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *cf. San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Justice Brennan stating for his dissent that "[n]othing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable").

Petitioner has been made to sustain substantial financial losses caused by the interpretation and enforcement

of Respondent's zoning ordinance. A standardless ordinance which permits no use until a legislative body grants its approval should be declared by this Court to constitute a temporary regulatory taking and compensable under the Fifth Amendment as an example of regulation that goes "too far".

V. Declaring an ordinance to be unconstitutional, years after the improvident denial of a use application, is an insufficient remedy and compensatory damages must be awarded.

The Court in *First English* held that the invalidation of a land use regulation without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

In the interest of facilitating judicial economy, Petitioner urges the Court to further consider whether a declaration that an ordinance is unconstitutional will be a sufficient remedy in light of the loss of substantial investment-backed expectations, especially when years have passed since the improvident denial of Petitioners' use application. Of course, determining the specific measure of compensation will be a matter to resolve on remand.

CONCLUSION

The Court should declare that both the interpretation and enforcement of Respondent's standardless ordinance constituted a temporary regulatory taking and was violative of Petitioner's constitutional rights under the Fifth and Fourteenth Amendments as well as 42 U.S.C. §1983. The matter should be returned to the Kentucky court system for a determination of damages, if any, that resulted by the violation, along with a determination of reasonable attorneys fees.

Respectfully submitted,

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RENDERED: May 13, 1994; 2:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 92-CA-003110-MR

ENTERPRISES VI, A KENTUCKY GENERAL PARTNERSHIP, ALBERT J. VESPER, III, RONALD J. VESPER, PAUL J. VESPER, STEPHEN J. VESPER, DENNIS J. VESPER and ALBERT J. VESPER, III (GUARDIAN OF ALICIA VESPER ESTATE) — APPELLEES

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

V.

BOONE FISCAL COURT and BOONE COUNTY PLANNING COMMISSION — APPELLEES

AND

NO. 93-CA-000262-MR

ERPENBECK COMMERCIAL ENTERPRISES, INC. — APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

V.

BOONE COUNTY PLANNING COMMISSION and BOONE COUNTY FISCAL COURT — APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: LESTER, CHIEF JUDGE, GARDNER, JUDGE, and VANCE, SPECIAL JUDGE.

GARDNER, JUDGE: Appellants, Erpenbeck Commercial Enterprises, Inc. (Erpenbeck) and Enterprises VI and various members of the Vesper family (hereinafter collectively referred to as Enterprise) appeal separately from a summary judgment entered by the Boone Circuit Court in favor of the appellees, Boone County Planning Commission (Planning Commission) and Boone County Fiscal Court (Fiscal Court). After carefully reviewing the record, this Court must affirm.

Enterprise owned 263 acres of commercially and industrially zoned property located on Kentucky Highway 18 in Boone County, Kentucky. In 1986, this property had been rezoned from Industrial One (I-1) to Commercial Two (C-2), Planned Development (PD) zone. The C-2/PD allowed a baseline C-2/commercial development subject to an extra layer of regulatory review pursuant to Article 15 of the zoning ordinance. Erpenbeck contracted to buy the 263-acre tract from Enterprise for approximately $27,000 per acre.[1] At the same time, Erpenbeck entered into a contract to sell 43 acres of this tract to

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[1] Erpenbeck had also earlier paid $250,000 to Donald and Debra Streck. The Strecks and Erpenbeck had been negotiating with Hyper Shoppes, Inc. concerning a Biggs Store project. This payment made on June 19, 1989, was for acquiring all rights the Strecks might have. Erpenbeck later sought this amount as damages.

Hyper Shoppes, Inc. (Hyper), and Hyper planned to construct a Biggs Department Store on the site. The alleged price was $120,000 per acre. The front 34.8 acres of this tract was zoned C-2/PD and the remaining nine acres were zoned I-1. The contract between Hyper and Erpenbeck allowed Hyper to pull out of the deal prior to February 28, 1990, or 30 days after the Fiscal Court approved the proper zoning, without suffering any penalty.

Erpenbeck filed an application with the Planning Commission on November 1, 1989, for zoning approval of the Biggs project under the C-2/PD zone.[2] A public hearing on the matter was held on December 6, 1989. The proposed plan showed the buildings in the C-2/PD zone and the parking lot/loading area extending into the I-1 zone. The Planning Commission after reviewing the Biggs plan, the Comprehensive Plan, and hearing all the evidence, recommended rejection of the proposed Biggs project on January 3, 1990. The reasons for rejection included potential traffic problems and incompatibility with the 1986 Comprehensive Plan. On January 11, 1990, Hyper terminated its contract with Erpenbeck. Further, the record reflects that Erpenbeck's option to purchase Enterprise's property expired on February 1, 1990, without being exercised.[3] The Fiscal Court decided on February 6, 1990, to uphold the Planning Commission's decision and

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[2] Erpenbeck also sought to have the zoning line changed, but its proposal was rejected by the Board of Zoning Adjustment. Apparently, no appeal was taken.

[3] Erpenbeck lost $150,000 "good faith" money as a result of this termination and sought this amount as part of its damages.

formally deny Erpenbeck's application for the Biggs project.

Appellants sought relief in Boone Circuit Court through a declaratory rights actions under Chapter 418 of the Kentucky Revised Statutes (KRS). They sought monetary damages based upon violations of KRS 446.070, and KRS Chapter 100, and based upon their claim of an alleged regulatory taking of the property by the appellees. They also brought claims pursuant to 42 U.S.C. Sections 1983 and 1988. The circuit court in an opinion and order of November 20, 1992, granted the defendants' motion to summary judgment. The circuit court ruled that any appeal from the Fiscal Court's decision was moot because there could be no practical effect by reversing since the Biggs deal was no longer viable, and the property had been rezoned again. The court found no legal support for any of Erpenbeck's and Enterprise's claims. Erpenbeck and Enterprise both appealed to this Court.

One of the first considerations for this Court is the mootness issue. The circuit court found that a direct appeal from the Fiscal Court's decision regarding the Biggs proposal was a moot issue, because no practical effect could be gained by reversing the Fiscal Court's decision. There could be no practical effect, because Hyper had terminated the Erpenbeck agreement weeks prior to the Fiscal Court's decision, and Erpenbeck's contract with Enterprise had terminated on February 1, 1990. This Court agrees that the issue of any specific requested relief is moot, because there is no longer a viable Biggs project for the property in question. This Court was presented with a substantially similar situation in *Bourbon County Joint Planning Commission v. Simpson*, Ky. App.,

799 S.W.2d 42 (1990), and held that there could be no practical effect. Thus, we turn to the appellants' claims for damages.

Appellants maintain that the circuit court erred in failing to recognize the validity of their causes of action and in not setting the matter for trial on the question of damages and causation. They first attack the constitutionality of Article 15, the Planned Development Section, of the Boone County Zoning Laws.[4] They contend that the ordinance lacks any ascertainable standards for applicants and creates arbitrary power in local zoning officials in violation of Kentucky Constitution, Section 2. They also argue that the planned development provisions violate the limitations placed upon a county's zoning power by KRS, Chapter 100. The crux of their argument is that the C-2/PD ordinance provides a property owner with no uses for the property. This Court must disagree.

Article 15 defines and governs planned development in Boone County. It states, "Planned Development (PD) is

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[4] The appellants did not provide a copy of Article 15 of the zoning ordinance with their briefs or provide a specific citation to the record so that this Court could locate it. Coincidentally and luckily, this Court found Article 15 when looking through exhibits provided with the record. This Court reiterates that it is not our job to search a record for testimony or items where no reference to the record is furnished. *Young v. Newsome*, Ky., 462 S.W.2d 908, 910 (1971); *Ventors v. Watts*, Ky. App., 686 S.W.2d 833, 834-835 (1985). Further, CR 76.12(4)(c)(iv) provides that an appellant's brief shall contain an argument with ample supportive references to the record and citations of authority pertinent to each issue of law. *Pierson v. Coffey*, Ky. App., 706 S.W.2d 409, 413 (1985).

a special overlay zoning district, which allows some variety among land uses and densities in return for imaginative designs." It also provides,

> Since Planned Development is an overlay zone, there is always an underlying zone which serves as a reference point to determine principally permitted accessory and conditional uses under the standard zoning classifications. However, if certain uses, which are not normally permitted in the underlying zone, are compatible, the Planned Development zone may be flexible to allow these uses. Also, the physical boundaries of the underlying zones within a Planned Development are intended to be flexible and not restrictive.

This Court finds that the circuit court correctly found that Article 15 is not violative of the Kentucky Constitutional provision and KRS, Chapter 100. The circuit court correctly ruled that KRS, Chapter 100 provides for flexible planned development type regulations. As correctly stated by the circuit court, substantially similar zoning provisions were upheld in *Bellemeade Co. v. Priddle*, Ky., 503 S.W. 2d 734 (1973). The Court in that case held that none of the statutes in KRS, Chapter 100 rendered planned neighborhood development zoning impermissible and also upheld the zoning against constitutional attack. The Court found that the zoning provisions were not void for lack of standards. In *Danville-Boyle County Planning and Zoning Commission v. Prall*, Ky., 840 S.W.2d 205 (1992), planned development statutes that were even more similar to those in the instant case were upheld by the Kentucky Supreme Court after being attacked on similar grounds. *See also Agins v. City of Tiburon*, 447 U.S.

255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). There is a presumption favoring the validity of a zoning ordinance, and the burden is upon those attacking it to prove that it is arbitrary. *Clark v. City of Paducah*, Ky., 439 S.W.2d 84, 86 (1969). If there is no more than a doubt about an ordinance's validity, it must stand as a valid exercise of the police power. *Id.*

Thus, this Court finds as a matter of law that the PD zoning provision in the instant case was not unconstitutional or in violation of KRS, Chapter 100. Article 15 expands already existing uses. Enterprise's property was originally zoned I-1, and by changing the zoning to C-2/PD, the appellees were expanding the potential uses of the property. Further, the record reflects that Erpenbeck received an adequate hearing on all facets of its plan for the Biggs store, and there is substantial evidence to support the Planning Commission's and the Fiscal Court's findings. *See Danville-Boyle County Planning and Zoning Commission v. Prall*, 840 S.W.2d at 108; *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, Ky., 379 S.W.2d 450 (1964). The record reflects that a lot of careful thought and analysis went into the Planning Commission's recommendations about the Biggs proposal. Thus, the appellants' argument that the ordinance and its application in this case was arbitrary must fail. The statutes in *Colyer v. City of Somerset*, 306 Ky. 797, 208 S.W.2d 976 (1947); *Board of Trustees of Town of Bloomfield v. Bayne*, 206 Ky. 68, 266 S.W. 885 (1924), and other cases cited by appellants are fundamentally distinguishable.

Appellants also argue that as a matter of law, the enforcement of the PD zoning ordinance constitutes a

taking of their property. They contend that the ordinance's application violates the Fifth Amendment to the United States Constitution and Section 242 of Kentucky's Constitution, because of the alleged taking without compensation. The circuit court's finding that a taking did no occur must be upheld.

Generally, a taking occurs when an owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good. *Lucas v. South Carolina Coastal Council*, ___U.S.___, 112 S.Ct. 2886, 2895, 120 L.Ed.2d 798 (1992). In deciding whether a taking has occurred, a court must consider the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 3119, 87 L.Ed.2d 126 (1985). A land use regulation does not affect a taking if it substantially advances legitimate state interests. *Id.* A state or local government may in exercise of its police powers, incidentally restrict property rights of individuals for the common good without payment. *Department for Natural Resources and Environmental Protection v. Stearns Coal and Lumber Co.*, Ky., 563 S.W.2d 471, 473 (1978). The action taken must bear a real and substantial relation to the public heath [sic], safety, morality or general welfare. *Id.* The takings clause clearly does not require compensation when an owner is barred from putting land to use that is proscribed by existing rules; if the proposed uses are not part of the title to begin with, then there is no taking. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. at 2901.

Almost invariably, some property owners suffer an actual or speculative financial loss as the result of zoning restrictions, but the mere fact that a forbidden use would be more profitable is not an unwarranted hardship which requires a finding of arbitrary action. *Clark v. City of Paducah*, 439 S.W.2d at 86. A diminution in property value alone does not constitute a taking; owners cannot show a taking simply by stating that they have been denied a property interest they heretofore had believed was available for development. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 2663, 57 L.Ed.2d 631 (1978). In *Agins v. City of Tiburon, supra*, the Court upheld a planned development zoning scheme. The court ruled that no taking had occurred as the planned development advanced legitimate governmental goals and was part of the police power. *Id.*, 100 S.Ct. at 2142. A court must consider the benefit to the public as a whole along with any diminution in market value the owner might suffer. *Id.*

As a matter of law, no taking occurred in the instant case. The Fiscal Court simply denied a single project to occur on the property owned by Enterprise.[5] There was no rezoning at question in this case; the property was zoned C-2/PD when Erpenbeck entered into the agreement with Enterprise and when Erpenbeck entered into the agreement with Hyper. All parties knew the zoning

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[5] Erpenbeck never actually owned or had legal title to the property in question as it allowed the option to expire without purchasing the property. *See Monticello Co. v. Commonwealth Natural Resources and Environmental Protection Cabinet*, Ky. App., 864 S.W.2d 921 (1993).

status when they entered into the deal. There are over 200 possible uses allowed under the C-2 zone. In this case, the Planning Commission and Fiscal Court simply denied one project. The reports regarding the proposed project were very thorough. The Planning Commission was trying to advance substantial goals by avoiding excessive traffic and pedestrian congestion, damage to the natural corridor and growth that was not in keeping with the Comprehensive plan. The property had been previously all zoned I-1 and part of it remained zone I-1. Such a project was clearly prohibited in I-1. Appellants have simply failed to show that a taking occurred in the instant case. This case is more akin to *Agins v. City of Tiburon, supra,* and is fundamentally distinguishable from cases cited by appellants.

Appellants also argue that because they were deprived of valuable property rights without substantive or procedural due process of law in violation of the Fourteenth Amendment to the United States Constitution, they are entitled to relief pursuant to 42 U.S.C. §§ 1983 and 1988. This argument is totally without merit.

42 U.S.C. § 1983 provides,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia; subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A person seeking damages under 42 U.S.C. § 1983 must prove actual injury caused by a denial of his or her constitutional rights. *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986). There must be a sufficient property or liberty interest shown. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 2708-2709, 33 L.Ed.2d 548 (1972).

Appellants have made absolutely no showing that they are entitled to relief pursuant to 42 U.S.C. §§ 1983 and 1988.[6] The cases cited by them are clearly not applicable to the case at bar. This Court has already found that the zoning ordinance in question was constitutional. As discussed earlier, the record shows that Erpenbeck received a fair hearing, and that there was substantial evidence to support the Planning Commission's and Fiscal Court's decision. There has been no showing of a violation of substantive or procedural due process. Appellants have also failed in proving there was a taking.

Erpenbeck also argues that as a matter of law, appellants have a valid cause of action pursuant to KRS 446.070 for enforcing an ordinance that violated KRS, Chapter

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[6] There is also an issue as to whether an action pursuant to 42 U.S.C. § 1983 was even appropriate in this case, since appellants had not exhausted their state claims or remedies when they brought the action. It has been held that persons bringing 42 U.S.C. § 1983 claims must exhaust all state claims and show that state remedies are inadequate. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S.Ct. at 3121; *Hammond v. Offutt*, 866 F.2d 172 (6th Cir. 1989); *Presley v. Board of Education of Martin County*, Ky. App., 859 S.W.2d 133-134 (1993). Appellants were still pursuing state avenues.

100, and for denying a permit-in violation of KRS 522.030. This argument again totally lacks merit. We have ruled earlier in this opinion that Article 15 of the Boone County Zoning Ordinances did not violate Chapter 100 of the KRS. Further, there has been no showing of official misconduct as discussed in KRS 522.030.

Enterprise contends that there were factual issues regarding the appellants' claim of intentional interference with contractual relations. This argument is unfounded as there has been absolutely no showing that the elements of this tort as outlined in *National Collegiate Athletic Ass'n, By and Through Bellarmine College v. Hornung*, Ky., 754 S.W.2d 855 (1988), exist in the case at bar.

Enterprise lastly argues that the circuit court erred by failing to allow discovery of certain documents. Enterprise has presented no authorities to support its position, and has not specifically identified the documents in question. We have reviewed the record and can find no error on this ground.

Finally, the appellants argue that the circuit court erred by signing an opinion and order prepared by the appellees which granted summary judgment and dismissed all of the appellants' claims. They contend that there were factual issues remaining, and factual conclusions were misstated by the circuit court.

In Kentucky, a summary judgment should be entered if there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Kentucky Rule of Civil Procedure (CR) 56.03. The record must be viewed in a light most favorable to the party opposing the motion, and all doubts are to be resolved in

his or her favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). A trial court must only grant a motion for summary judgment if it appears that it would be impossible for the respondent to produce evidence warranting a favorable judgment against the movant. *Id.*; *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985).

In the instant case, there were no genuine issues of material fact. The issue regarding whether Hyper cancelled its contract as a result of the zoning process is immaterial since this Court has found that the zoning ordinance, procedures, and ultimate decision were valid, and since Hyper could pull out for any reason under the terms of the contract with Erpenbeck.

For the foregoing reasons, the judgment of the Boone Circuit Court is affirmed.

LESTER, CHIEF JUDGE, CONCURS.

VANCE, SPECIAL JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

VANCE, SPECIAL JUDGE, DISSENTING. I respectfully dissent from the majority opinion which affirms the summary judgment entered by the trial court. I would hold that the commercial two (C-2) planned development (PD) zone violates the constitution of Kentucky, because it contains no standards from which it can be ascertained whether or not a proposed development is entitled to approval or disapproval, and thus approval or disapproval of any proposed development is left entirely to the arbitrary discretion of the members of the fiscal court.

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BOONE CIRCUIT COURT:
CONSOLIDATED CIVIL ACTION NOS.
90-CI-174 AND 90-CI-175

ENTERPRISE VI, ET AL — APPELLANTS/PLAINTIFFS

vs.

BOONE COUNTY FISCAL COURT, ET AL — APPELLEES/DEFENDANTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC., ET AL — APPELLANTS/PLAINTIFFS

vs.

BOONE COUNTY FISCAL COURT, ET AL — APPELLEES/DEFENDANTS

OPINION AND ORDER
GRANTING DEFENDANTS SUMMARY JUDGMENT

* * *

Erpenbeck Commercial Enterprises, Inc. (Erpenbecks), Enterprise VI, and Albert J. Vesper, III (Vespers), appeal Boone Fiscal Court's decision of February 6, 1990. That decision denied Erpenbecks' application under Article 15 of Boone County's zoning regulations to approve a Biggs hypermarket retail center on 43.45 acres owned by Vespers. Their consolidated appeals are pursuant to K.R.S. 100.347. Vespers appeal under this statutory authority even through they were not applicants to Erpenbecks' submitted application.

Vespers and Erpenbecks also seek declaratory judgment relief and money damages from Boone Fiscal Court. They contend Article 15 is unauthorized as zoning regulations under Chapter 100 and that Fiscal Court's actions constitute a compensable taking. They assert inverse condemnation, tortious interference with contractual relations, constitutional violations and violations of state and federal law to support the money damages claims.

The Boone County Planning Commission, organized under Chapter 100, recommended Erpenbeck's application be denied. Fiscal Court and Planning Commission members were sued individually but dismissed as defendants. All remaining parties have moved for summary judgment.

Fiscal Court and the Planning Commission argue that none of their actions caused damage or injury entitling plaintiffs to relief. From the undisputed material facts and applicable law, this Court agrees.

Facts

On July 21, 1989, Erpenbecks contracted to purchase Vespers' 264 acres located on the north side of Kentucky Highway 18 between Zig Zag Road and Old Limaburg Road. All 264 acres had to be purchased and full payment of the $7,250,000.00 price made no later than February 1, 1990. Vespers retained the $150,000.00 earnest money, Erpenbecks having failed to fulfill this contract.

Erpenbecks previously paid $250,000.00 to Donald and Debra Streck and Streck's corporation. Strecks and Erpenbecks had been negotiating with Vespers and Biggs

parent company, Hyper Shoppes, Inc., to acquire the Vesper property and sell part of it to Biggs. This payment, made on June 19, 1989, acquired all rights Strecks might have, even though no contracts then existed with Vespers or Biggs.

Erpenbecks had no agreement with Biggs until August 17, 1989. Biggs reserved the right to terminate the agreement for any reason, in its sole discretion and judgment and could have done so prior to February 28, 1990, or 30 days after Fiscal Court approved Erpenbeck's proposal, whichever was later. On January 11, 1990, Biggs terminated the agreement with Erpenbecks, approximately 3 weeks before Fiscal Court acted. Further, since Erpenbecks failed to fulfill their contract with Vespers by purchasing all 264 acres no later than February 1, 1990, that contract became null and void by its own terms. When Fiscal Court acted on February 6, 1990, Erpenbecks no longer had a contractual interest in the property comprising their application.

Erpenbeck's application comprised 43.45 acres that was part of the Vesper property. Only 34.8 acres was zoned for commercial retail use and was subject to a planned development overlay classification under Article 15. The remaining approximate 9 acres was zoned industrial, not commercial retail, and was not subject to a planned development overlay review. None of the 43.45 acres has ever been zoned to allow as a matter of right the Biggs retail center.

Fiscal Court so zoned this 43.45 acres in 1986 as part of the county-wide zoning update. Prior to that time, all

of the 264 acres was zoned industrial. The C-2/PD provided an opportunity that the Vesper property previously never had. It allowed commercial development, subject to the extra layer of regulatory review under Article 15. That review would allow commercial development compatible with the 1986 comprehensive plan. Erpenbecks knew the Vesper property's zoning classification in June, 1989. They acknowledged that classification in the contracts with Vesper and Biggs, providing that zoning approval required Fiscal Court approving Erpenbeck's application and concept development plan by enacting an ordinance.

Erpenbecks submitted their application for a Biggs hypermarket retail center on November 1, 1989. It sought approval for 417,600 square feet of regional retail space on the 34.8 acres commercially zoned. All the shipping and receiving area and some of the 2,113 parking spaces needed for this intense regional retail development extended into the industrial zone. These facilities were exclusively to serve the commercial development and were not accessory to any industrial use in the industrial zone. Plaintiffs argue that this approximate 9 acre overlap imposes no adverse land use impact since parking and shipping areas are allowed in the industrial zone to serve industrial users. The distinction, however, is that by allowing the commercial regional retail development to extend by this magnitude into the industrial zone, the massive commercial development in the C-2/PD zone becomes larger, generating higher volumes of regional retail traffic.

The 1986 Boone County Comprehensive Plan recommends that this segment of Kentucky 18 be commercially

developed, but not for regionally oriented massive retail that generates high volumes of traffic. That type of regional retail development is identified as being more appropriate and suitable for areas closer to the interstate highway system, such as Mall Road. For this reason, the Commission recommended and the Fiscal Court zoned the property with a planned development overlay. Without that regulatory review process it would not have been consistent with the comprehensive plan to zone the area commercial two. That zoning classification, without a planned development overlay, would have allowed massive regionally oriented retail development, contrary to the comprehensive plan.

For Erpenbecks, it was crucial that Biggs purchase the 43.45 acres. Without that purchase, Erpenbecks would not close with Vespers on the 264 acres. While Biggs purchase was crucial to Erpenbecks, Biggs at no time was obligated to perform under its agreement with Erpenbecks. When Biggs terminated, it was entitled to a complete refund of its earnest money, with accrued interest. At that time, Biggs did not know costs for the concept development plan had exceeded the only installment paid for those costs of $50,000.00. Only to compromise a dispute with Erpenbecks did Biggs pay more than that installment of $50,000.00 for development plan costs.

The facts further clearly show that even had the Erpenbeck application received Fiscal Court approval, it was not fully acceptable to Biggs for purchase purposes. Biggs wanted the retail center building located to the rear of the 43.45 acres, in the industrial zone. That placement would provide a larger parking field between the retail center and Kentucky 18 and was necessary to make the

plan more acceptable to Biggs. Pierre A. Wevers, executive vice-president of Hyper Shoppes considered placing the Biggs retail center in the industrial zone part of the general process of the Erpenbeck plan getting zoning approval. Michael C. Phillips, then Director of Real Estate for Hyper Shoppes, oversaw this project for Biggs. Being unable to place the hypermarket building in the industrial zone meant, to him, that the site and Erpenbeck's plan was unacceptable and unusable for a Biggs. Even had Fiscal Court approved the Erpenbeck plan, there is no evidence Biggs would have purchased the 43.45 acres.

From the undisputed facts, the following dates are significant:

1. June 19, 1989 – Erpenbecks $250,000.00 payment to Strecks;

2. July 21, 1989 – Date of Vesper-Erpenbeck Contract;

3. August 17, 1989 – Date of Erpenbecks-Biggs (Hyper Shoppes) Contract;

4. November 1, 1989 – Erpenbeck application filed with commission;

5. December 6, 1989 – Public Hearing date before Commission;

6. January 3, 1990 – Commission recommendation to Fiscal Court;

7. January 11, 1990 – Biggs terminates Erpenbeck Contract;

8. February 1, 1990 – Erpenbeck option to purchase Vesper property expires without being exercised; and

9. February 6, 1990 – Fiscal Court final action denies Erpenbeck application.

Applicable Law

Erpenbecks and Vespers allege, based on Fiscal Court's denial, Biggs cancelled the agreement with Erpenbeck and, in turn, Erpenbeck cancelled the agreement with Vespers. Clearly, Biggs terminated the Erpenbeck agreement weeks prior to the Fiscal Court action and Erpenbeck's contract with Vespers terminated by its own terms on February 1, 1990. There no longer was a viable application for a Biggs retail center and Erpenbeck had no contractual interest when Fiscal Court acted, and Vespers were not parties to that application. Therefore, Erpenbecks and Vespers are not aggrieved persons by the Fiscal Court's action as required by K.R.S. 100.347 and they are not entitled to relief under that statutory appeal. Further, the appeal presents a moot issue as there can be no practical effect by reversing Fiscal Court's decision. Another factor rendering the appeal moot is Fiscal Court rezoned the previous C-2/PD area to a commercial four zone as part of the county 1991-1992 comprehensive plan and zoning update. This new classification does not allow regional retail development at the intensity proposed for the Biggs retail center. See K.R.S. 100.347; *Bourbon Co. Joint Planning v. Simpson*, Ky.App., 799 S.W.2d 42 (1990); and *Shelby Petroleum v. Croueher*, Ky.App., 814 S.W.2d 930 (1991).

These same mootness considerations apply to plaintiff's request for declaratory judgment relief. However, even if not moot, Fiscal Court's decision adopting the

Commission's recommendation and its findings are supported by the record. The supporting committee report dated January 3, 1990, comprises nine pages, listing numerous reasons to deny, based on land use impacts, the comprehensive plan, intensity of development, traffic generation, land use incompatibility, and the development extended into the industrial zone. Deference must be afforded governmental administrative regulatory decisions and upheld if substantial, reliable and probative evidence within the record as a whole support the decision. *American Beauty Homes Corp. v. Louisville*, Ky., 379 S.W.2d 450 (1964), *Louisville v. McDonald*, Ky., 470 S.W.2d 173 (1971), and *Hocker v. Fisher*, Ky.App., 590 S.W.2d 342 (1979).

Here, the record supports the Fiscal Court's decision and the Commission recommendation. To hold otherwise requires approval of a development that conflicts with the comprehensive plan and extends commercial development into an industrial zone. See *Carlton v. Taylor*, Ky.App., 569 S.W.2d 679 (1978).

Plaintiffs argue Fiscal Court's action constitutes a regulatory compensable taking, as applied or on its face, under federal and state law. They contend the planned development regulations do not advance a legitimate governmental interest, are not authorized under Kentucky law, and prohibit all beneficial or productive use. This Court finds no legal support for these arguments, based on these facts.

The planned development overlay had a C-2 underlying zone, recognizing numerous uses that Erpenbecks

or Vespers could pursue. Those regulations did not prohibit or ban submittal of applications for any of these uses. Only the delay associated with the review process was caused by the planned development overlay. This process does not amount to a moratorium as plaintiffs urge. Instead, it imposes a regulatory review process based on the comprehensive plan to determine the compatibility, appropriateness and intensity for uses in the underlying zone. Rather than prohibiting all use, these regulations provided a review process under which any of numerous uses may have been approved and, therefore, do not represent a compensable taking. See *First English v. Los Angeles Cty.*, 107 S.Ct. 2378 (1987); *Pennell v. City of San Jose*, 108 S.Ct. 849 (1988); *Keystone Bituminous Coal v. DeBenedictus*, 107 S.Ct. 1232 (1987); and *Com., Nat. Resources v. Starns Coal and Lumber*, Ky., 678 S.W.2d 378 (1984).

Kentucky law provides broad authority for zoning regulations. K.R.S. 100.201 and .203 recognize as legitimate purposes for zoning those same reasons and land use impacts applied herein as part of the planned development review.

These statutes authorize zoning under local governments' police powers to promote public health, safety and general welfare within the planning unit. Facilitating orderly and harmonious development, regulating intensity of land use, preventing overcrowding of land and congestion in the circulation of people are specifically recognized as legitimate governmental purposes for exercising zoning authority. Special zoning districts promoting proper development of planned business or

commercial districts and regulating activities and structures on land at or near major thoroughfares, interchanges, transportation arteries, and other places having a special character are expressly authorized. This broad statutory authority has been recognized to include and encourage flexible planned development type regulations. See Tarlock, *Kentucky Planning and Land Use Control Enabling Legislation, Etc.*, 56 Ky. L.H. 556 at 598 (1968).

In *Bellemeade Co. v. Priddle*, Ky., 503 S.W.2d 734 (1974) similar if not identical regulations were upheld under these statutes. Where regulations promoting these legitimate governmental purposes are consistent with the comprehensive plan, they are a valid exercise of Chapter 100 zoning authority. Moreover, the planned development review process did not apply in all zoning districts. Plaintiffs could have pursued a number of uses under the C-2/PD zone or sought a rezoning to another district without the planned development overlay.

Clearly Article 15 is consistent with and advances recognized legitimate governmental interests of regulating land use. Plaintiffs seek the equivalent of a judicially imposed zone change, without following Chapter 100. This, the Court cannot do. *Sladon v. Shawk*, Ky.App., 815 S.W.2d 404 (1991) and *Louisville v. McDonald*, supra. Even if the overlay regulations are invalidated, plaintiffs are not unilaterally entitled to a C-2 zone. Plaintiffs never sought a zone change and a C-2 zone allows development contrary to the comprehensive plan. The Court cannot assume such legislative power. Instead, the prior industrial zoning would apply and Erpenbecks still would not have been entitled to approval. See *Mann v. City of Ft. Thomas*, Ky., 437 S.W.2d 209 (1969).

For the same reasons plaintiffs' facial taking argument must be rejected. To prevail, the mere enactment of the overlay regulations in 1986 must show on its face a prohibition of all productive use. Mere delay associated with a regulatory review process that allows some productive use is not a taking on its face. It must be applied to determine whether it will amount to a taking. *Agins v. City of Tiburon*, 100 S.Ct. 2138 (1980); *Penn Central v. City of New York*, 98 S.Ct. 2646 (1978); *Lucas v. South Carolina Coastal Council*, ___S.Ct.___ dec'd June 29, 1992; *First English*, supra; and *Pennell*, supra. Other property in the immediate vicinity zoned C-2/PD has approved commercial development at a lesser intensity.

Other states applying the Supreme Court's taking analysis reach the same result. Even wetland legislation does not affect a compensable taking where the owner may apply for uses that could be approved under a discretionary approval process. Where property is subject to such a process when the developer contracts to purchase, that developer has no protected investment backed interest or expectation that the approval will be granted. *Gil v. Inland Wetlands and Watercourses*, 593 A.2d 1368 (Conn. 1991); *Namon v. DER*, 558 So.2d 504 (Fla. 1990); and *Carabell v. DNR*, 478 N.W.2d 675 (Mich.App. 1991).

Denial of the most profitable or beneficial use of land is not a constitutional violation of just compensation or substantive due process. *Andrus v. Allard*, 100 S.Ct. 318 (1979) and *Euclid v. Ambler Realty Co.*, 47 S.Ct. 114 (1926). Judge Bertelsman followed this same principle in a Kentucky case. See *Stratford v. State-House, Inc.*, 542 F.Supp. 1008 (E.D. Ky. 1982).

Plaintiffs additionally cite K.R.S. 446.070 and 522.030 for statutory damages. There is no proof of statutory violations entitling plaintiffs to money damages. Plaintiffs also assert a tort claim for interference with contract relations. There is no proof to support allegations of improper interference by defendants. Further, defendants were engaged in regulatory functions of government of a quasi-judicial nature which does not constitute tortious conduct for which they can be liable in tort. See K.R.S. 65.2003; *NCAA v. Hornung*, Ky., 754 S.W.2d 855 (1988); and *Bolden v. City of Covington*, Ky., 803 S.W.2d 577 (1991).

Plaintiffs argue the zoning administrator approved the extension of commercial development into the industrial zone. They offer the administrator's October 5, 1989, letter as his ruling. This Court rejects this argument. K.R.S. 100.271 prohibits a zoning administrator from allowing uses that do not conform to the literal terms of the zoning regulations. Only the Fiscal Court can approve uses for areas subject to a PD overlay. The October 5th letter merely informs that the PD review may allow some minimal overlap. Erpenbeck's application was not filed until November and its overlap exceeded 10% mentioned in the informational letter. Cases cited by plaintiffs involve instances where the official had authority to make a decision. Here, the administrator had no authority to approve uses in areas zoned planned development.

Another pending matter is Vesper's motion to compel production of documents. The parties have submitted memoranda and the Court has reviewed the documents in-camera. These documents clearly are communications within the attorney-client relationship on legal matters arising from that relationship. This Court has previously

held the documents are not subject to inspection under the Open Records Act. Further, the documents are not relevant in themselves, nor calculated to lead to relevant facts. Plaintiff's motion to compel is overruled.

ORDER

Based upon these facts and authorities plaintiffs cannot prevail and Boone Fiscal Court and Boone County Planning Commission are entitled to judgment as a matter of law.

IT IS HEREBY ORDERED AND ADJUDGED that Boone Fiscal Court and Boone County Planning Commission are granted Summary Judgment, dismissing all claims and plaintiffs' appeals.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that plaintiffs' motions for declaratory judgment and summary judgment are overruled and denied, with prejudice.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that this is a final and appealable judgment pursuant to Civil Rule 54.02 and there is no just reason for delay. The Clerk is directed to provide notice of entry of this order pursuant to Rule 77.04.

/s/ J. F. Bamberger
JUDGE,
BOONE CIRCUIT COURT

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COMMONWEALTH OF KENTUCKY

COURT OF APPEALS
NO. 92-CA-003110-MR

ENTERPRISES VI, A KENTUCKY
GENERAL PARTNERSHIP,
ALBERT J. VESPER, III,
RONALD J. VESPER,
PAUL J. VESPER,
STEPHEN J. VESPER,
DENNIS J. VESPER and
ALBERT J. VESPER, III
(GUARDIAN OF ALICIA
VESPER ESTATE) APPELLEES

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

v.

BOONE FISCAL COURT and
BOONE COUNTY PLANNING
COMMISSION APPELLEES

AND: 93-CA-000262-MR

ERPENBECK COMMERCIAL
ENTERPRISES, INC. APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 90-CI-174

vs.

BOONE COUNTY PLANNING
COMMISSION and BOONE
COUNTY FISCAL COURT APPELLEES

ORDER DENYING PETITION FOR REHEARING

* * *

BEFORE: LESTER, CHIEF JUDGE; GARDNER, JUDGE, and VANCE, SPECIAL JUDGE.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

/s/ Charles B. Lester
JUDGE, COURT OF APPEALS

ENTERED: Aug 26, 1994

SUPREME COURT OF KENTUCKY
94-SC-769-D & 94-SC-778-D
(92-CA-3110-MR & 93-CA-262-MR)

ENTERPRISE VI, A KENTUCKY GENERAL PARTNERSHIP, ET AL. — MOVANTS

BOONE CIRCUIT COURT
NO. 90-CI-174

v.

BOONE COUNTY FISCAL COURT, ET AL. — RESPONDENTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC. — MOVANT

BOONE CIRCUIT COURT
NO. 90-CI-175

v.

BOONE COUNTY FISCAL COURT, ET AL. — RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motions for review of the decisions of the Court of Appeals are denied.

Entered December 14, 1994.

/s/ Robert F. Stephens
Chief Justice

COURT OF JUSTICE
BOONE CIRCUIT COURT
BOONE COUNTY, KENTUCKY

ENTERPRISE VI, a
Kentucky General Partnership
ALBERT J. VESPER III
RONALD J. VESPER
PAUL J. VESPER
STEPHEN J. VESPER
DENNIS J. VESPER
General Partners

Case No. 90-CI-174

(Filed Jul. 5, 1991)

and

ALBERT J. VESPER III, Guardian
of the Estate of Alicia Vesper

Appellant-Plaintiffs

vs.

BOONE COUNTY FISCAL COURT
BRUCE FERGUSON
DON DAVIS
IRENE PATRICK
SHIRLEY MEIHAUS
BOONE COUNTY PLANNING COMMISSION
LARRY BARNETT
FRED BURCH
LAWRENCE COLLINS
R. N. GREENE
RECTOR JONES
ROBERT KIRBY
DONALD McMILLAN
BARRY NELTNER
THURMAN OWENS
RALPH RUSH
FLOYD SHARP
CAROL SMITH
WILLIAM VIOX
ERPENBECK COMMERCIAL ENTERPRISES, INC.

Appellee-Defendants

NOTICE OF APPEAL FROM DECISION OF BOONE COUNTY FISCAL COURT AND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND MONETARY DAMAGES

****

DEMAND FOR TRIAL BY JURY

****

1. Appellants, Enterprise VI, a Kentucky general partnership, Dennis J. Vesper, managing partner, and Albert J. Vesper III, guardian for the estate of Alicia Vesper, are the owners of real estate located in Boone County, Kentucky, on Route 18, which is fully described in Exhibit "A" attached to the original action.

2. Appellants hereby give Notice of Appeal to the Boone Circuit Court from the final decision of the Boone County Fiscal Court, rendered February 6, 1990, adopting the recommendation of the Boone County Planning Commission denying the utilization of the underlying zone on the property of the Appellants.

3. The Appellants, and each of them, have been injured and aggrieved by the action of the Boone County Fiscal Court and bring this Appeal pursuant to Kentucky Revised Statutes §100.347 as interpreted and applied by the Boone County Fiscal Court through its "Zoning Regulations: Boone County, Kentucky" adopted December 1986, (herein "Zoning Order") Section 230.

4. Appellants appeal the action of the Boone County Fiscal Court as contrary to law and fact in that:

A. The decision of the Boone County Fiscal Court is contrary to and arbitrary based on the evidence presented; or

B. The decision of the Boone County Fiscal Court was arbitrary in that it was not supported by substantial evidence; or

C. The action of the Boone County Fiscal Court denying Appellant's use of its property causes Appellants to be treated differently than other persons similarly situated and inconsistent with the mandates of K.R.S. §100.203 requiring uniformity of regulations; or

D. The action of the Boone County Fiscal Court in denying Appellants the use of their property bears no reasonable relationship to the public health, safety, morals, or general welfare of Boone County; or

E. The action of the Boone County Fiscal Court in denying the use of the Appellants' property is unreasonable, arbitrary, and confiscatory and is an abuse of its discretion; or

F. The Boone County Fiscal Court's Zoning Order, Article 15, is contrary to, not authorized by and inconsistent with Chapter 100 of the Kentucky Revised Statute; or

G. The action of the Boone County Fiscal Court in denying the use of the Appellants' property is inconsistent with the "Zoning Order" in that:

(i) The Fiscal Court has applied the Zoning Order, Article 15, regulations to the Appellants' property although no Concept Development Plan has been proposed or adopted for the subject property by the Boone County Fiscal Court as required by Zoning Order, §1502; and/or

(ii) The Boone County Fiscal Court and the Boone County Planning Commission failed to follow the requirements of the Zoning Order, §1506, when it failed to make a finding that the proposed use of Appellants' property did not "deviate from standard district regulations"; and/or

(iii) The Boone County Fiscal Court failed to implement and enforce its Zoning Order when the proposed use of the Appellants' property was authorized under the Zoning Order, including Articles 9 and 10.

5. The action of the Boone County Fiscal Court and its Boone County Planning Commission in denying the use of the Appellants' property was a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States prohibition against depriving "any person of life, liberty or property without due process of law" and violative of sections 13 and 242 of the Constitution of the Commonwealth of Kentucky.

WHEREFORE, the Boone Circuit Court is asked to review the actions of the Boone County Fiscal Court and render appropriate orders.

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Enterprise VI and
Albert J. Vesper III, Guardian

AMENDED
COMPLAINT FOR DECLARATORY JUDGMENT
AND
MONETARY DAMAGES

I. Introduction

1. This action is brought pursuant to Kentucky Revised Statute, Chapter 418, and the Rules of Civil Procedure and seeks a declaration of rights of the Plaintiffs under Kentucky Planning and Zoning Statutes, Kentucky Revised Statute 100.111 et seq. and the "Zoning Order: Boone County, Kentucky," adopted December 1986. Additionally, Plaintiffs seek an award of damages from the Boone County Fiscal Court for inverse condemnation; interference with contractual relations, violations of the United States Constitution, Constitution of Kentucky, federal and state law and in the alternative, against the other Defendants individually.

II. Parties

2. Enterprise VI is a Kentucky general partnership consisting of Albert J. Vesper III, Ronald J. Vesper, Paul J. Vesper, Stephen J. Vesper and Dennis J. Vesper, who serves as managing partner. Albert J. Vesper III is guardian for the estate of Alicia Vesper pursuant to an order of the Kenton District Court, Probate Division (herein individually and collectively referred to as "Vesper"). Vesper has been aggrieved and injured by the actions of the Boone County Fiscal Court and the Boone County Planning Commission.

3. Vesper is the owner of a 264 acre parcel of real estate located in Boone County, Kentucky, on Kentucky 18

at Limaburg, Kentucky. The subject of this litigation is a particular 43.45 acre site which is part of the larger tract and described in Exhibit A attached (herein "Zoned Parcel").

4. The Boone County Fiscal Court (herein "Fiscal Court") is the chief body with legislative power in the county where the Zoned Parcel is located. It has the authority to regulate the zoning in unincorporated areas of Boone County pursuant to Chapter 100 of the Kentucky Revised Statutes (herein "Zoning Enabling Legislation").

5. The Fiscal Court acts through its county commissioners and the county-judge executive. The members of the Fiscal Court are Bruce Ferguson, as County-Judge Executive, Don Davis, Commissioner, Shirley Meihaus, Commissioner, and Irene Patrick, Commissioner (herein "Fiscal Court Members")

6. The Boone County Planning Commission (herein "Commission") is the planning unit established by the Fiscal Court pursuant to the Zoning Enabling Legislation to perform planning operations for the Fiscal Court and operate as an administrative body of the Fiscal Court in performing those duties. Included within these duties is (i) the making of recommendations to the Fiscal Court under Article 3 of the Zoning Order and (ii) review with recommendation of applications under Article 15 of the Zoning Order.

7. Defendants, Larry Barnett, Fred Burch, Lawrence Collins, R.N. Greene, Rector Jones, Robert Kirby, Donald McMillan, Barry Neltner, Thurman Owens, Ralph Rush, Floyd Sharp, Carol Smith, and William Viox, are members

of the Boone County Planning Commission (herein "Commission Members"), who in their capacity as commissioners have taken part in action described in rejecting the use of the Zoned Parcel, all of which have aggrieved and injured Vesper. William Viox is Chairman of the Commission (herein "Chairman") and has authority and acted in such capacity uniquely in relation to the Zoned Parcel.

8. Erpenbeck Commercial Enterprises, Inc., is a Kentucky corporation (herein "Erpenbeck") who contracted with Vesper to purchase among other property, the Zoned Parcel. Erpenbeck was the applicant before the Fiscal Court and Commission for utilization of the underlying zone on the Zoned Parcel and is a Defendant in this action pursuant to K.R.S. 100.347(4).

FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF

III. Statement of Case and Controversary

9. In December of 1986, the Fiscal Court adopted the Zoning Order based upon alleged authority granted by the Zoning Enabling Legislation.

10. Pursuant to the Zoning Order, the Fiscal Court adopted a Zoning Map for Boone County which indicated that a Zoned Parcel was zoned a combination of "C-2" Commercial District Two and "I-1" Employment District Industrial One. The section of the Zoned Parcel designated "C-2" was overlaid with a "PD" Planned Development special zoning district as defined by Article 15 of the Zoning Order.

11. The "C-2" District is the type of zoning which permits a variety of retail business and office uses without limit to the market area which is serviced including but not limited to: department stores, discount stores and major purchase retail centers. The purpose of a "C-2" district is:

> " . . . to provide comparable shopping goods, personal and professional services, and some convenience goods required for normal living needs as well as major purchase opportunities." (Zoning Order, §920).

Uses in a "C-2" district includes all uses permitted in a "C-1" or "O-1" district. The minimum size of a development in a "C-2" district is two acres with maximum intensity for development over four (4) acres of 18,000 square feet of gross floor space per acre.

12. The "I-1" Employment District Industrial One is a type of zoning which permits small to medium scale transportation, warehouse, light manufacturing and related services. Uses permitted in the district include but not limited to: wholesale manufacturing, distribution and assemblage of products, and truck terminals. The minimum size of the development is five acres with the maximum intensity not exceeding 25,000 square feet of gross floor space per acre.

13. Pursuant to the Zoning Order, the placement of a "C-2" district (§920) and "I-1" district (§1030) are located on suitable lands with access to expressways or arterial roads in a regional trade and transportation environment.

14. The "PD" Planned Development is a special overlay zoning district, provided for in the Zoning Order, Article 15, which allows some variety among land uses and densities. Article 15 of the Zoning Order describes the intent of the "PD" district as:

> " . . . to provide a permissive and *alternative zoning procedure* . . . (for) . . . proposals capable of providing substantial values to the community *over the conventional districting and other regulations* prescribed as normal course in this order . . . "(§1500) (emphasis added)

A "PD" is an overlay zone which means there is always an *underlying zone* which serves as a reference point to determine principally permitted uses under the standard zoning classification. A "PD" zoning will allow variance of use, design, intensity, size and other features of a development. A "PD" district will allow intensity of uses equal to 150% of use permitted in the underlying district.

(A) Zoning with a "PD" Overlay District.

(i) Pursuant to the Zoning Order, a planned development district overlay may be approved by the Commission and Fiscal Court in the manner provided by Article 15 (§1502).

(ii) The procedure for obtaining a "PD" overlay is initiated by the owner of the property to be overlaid with the "PD" designation:

> (1) the owner meets with the commission staff, where, among other things, the staff would specify the modifications required of the Concept Development Plan and the applicability of other regulations (§1503);

> (2) the owner submits a Concept Development Plan (§1504);
>
> (3) the Commission conducts a public hearing (§1505);
>
> (4) the Commission makes a recommendation on the Concept Development Plan (§1506); and
>
> (5) the Fiscal Court acts on the Commission's recommendation (§1507) by placing the "PD" overlay, on the owner's property.

This procedure is the only procedure described in Article 15 for the application of a PD to an underlying zone in Boone County.

(B) The Commission's Review of the Concept Development Plan.

In reviewing the Concept Development Plan (step 3 above), the standard that the Commission is required to apply is specified in Zoning Order §1506 as:

> " . . . it is consistent with the intent and purpose of this order; whether the proposed development . . . justify the *deviation from the standard district regulations.*" (emphasis added)

15. The Zoned Parcel has never been the subject of an approved Concept Development Plan. Accordingly, pursuant to the Zoning Order, the Zoned Parcel was not subject to the regulations of Article 15.

16. By placing the PD overlay on the Zoned Parcel, without owners request, the Fiscal Court allowed no permitted uses on the parcel without further legislative action.

17. A parcel with a PD overlay placed upon it at the initiative of the Fiscal Court, cannot obtain a zone permit under Article 14 of the Zoning Ordinance without legislative action by the Fiscal Court.

18. Vesper, by contract, agreed to sell the Zoned Parcel, along with the balance of the tract of land, to Erpenbeck.

19. Erpenbeck contracted to sell to Hyper Shoppes, Inc., dba Bigg's (herein "Bigg's"), the Zoned Parcel for the construction of a retail shopping mall to accommodate a Bigg's discount store (herein "Project").

20. Bigg's had the option to withdraw from the purchase should Erpenbeck be unsuccessful in timely obtaining the necessary permits from Boone County for the construction of the Project.

21. Erpenbeck similarly had the option to withdraw from the contract of purchase and sale with Vesper if Erpenbeck was unsuccessful in obtaining the necessary permits from Boone County for the construction of the Project.

22. Erpenbeck, through its officers and agents, met with the staff of the Commission and explained the details of the Project.

23. The purpose of this meeting and other meetings with the staff of the Commission was for the staff to advise Erpenbeck of any manner in which the Project proposal violated requirements of zoning laws so that modifications, if necessary, could be made or considered before the public hearing.

24. Erpenbeck explained that the Project was or could be modified to be wholly consistent with the underlying zoning on the Zoned Parcel and that to resort to the rezoning or increased densities of the PD overlay (as provided in Article 15 of the Zoning Order) was unnecessary.

25. The staff of the Commission, including the Boone County Zoning Administrator, Jerry Newton, instructed Erpenbeck that no proposal for the Zoned Parcel would be accepted without the filing of a Concept Development Plan as defined by Article 15 of the Zoning Order and K.R.S. §100.111(8).

26. At no time prior to the final decision was Erpenbeck advised of any manner in which the Project violated requirements of the underlying "C-2" or "I-1" zoning or any other zoning regulation.

27. Erpenbeck protested the submission of a Concept Development Plan since the Project was consistent with the underlying zoning on the Zoned Parcel.

28. Based on the Zoning Administrators interpretation of the Zoning Order, Erpenbeck was incorrectly and needlessly required to submit a Concept Development Plan to the Commission and to undergo the procedures of Article 15 of the Zoning Order.

29. In an effort to mitigate damages, on November 1, 1989, Erpenbeck filed an application affecting the Zoned Property for "The Utilization of an Underlying Zone in Planned Development" with the Commission which clearly disclosed that the uses and intensities of the Project were consistent with the underlying zone and

that none of the benefits of a PD Planned Development were requested or required.

30. The Commission scheduled a public hearing for November 29, 1989, on the application at which time the hearing was rescheduled to December 6, 1989, because of the large number of witnesses in attendance.

31. On December 6, 1989, a Public Hearing was conducted by the Commission at the Boone County High School gymnasium where the staff delivered its report and testimony was taken from various witnesses.

32. Although not reflected in the minutes of the Commission meetings, the application of the Erpenbeck's was apparently assigned by the Chairman to a committee for review and recommendation. This committee consisted of Barry Neltner, Fred Burch, Rector Jones, Larry Barnett, Carol Smith and Phil Damstrom (who did not appear to participate).

33. The Committee of the Commission filed its report, dated January 3, 1990, and made no findings regarding the Project and its relationship to the underlying zoning nor did the Committee determine whether the Project was a deviation from the standard district regulations.

34. The Committee, in its report, concluded the Project was evaluated from a "land use standpoint" and volunteered the Erpenbeck proposed end-user of the Zoned Parcel (i.e. Bigg's) could find other locations in Boone County.

35. On January 3, 1990, the Commission without comment adopted the report of the Committee and recommended to the Fiscal Court "that the proposed use not be allowed."

36. The Boone Fiscal Court, at its meeting on February 6, 1990, without comment, adopted the final action of the Commission and refused the use of the Zoned Parcel as described in the Project.

37. Based upon the actions of the Fiscal Court, Bigg's have cancelled the contract with Erpenbeck and Erpenbeck has cancelled the contract with Vesper.

IV. Argument

38. Defendants, Fiscal Court and Commission, and the individual Commission members named herein, in denying the use of the underlying zone on the Zoned Parcel grossly abused its discretion, acted contrary to law, and acted in a manner that bears no reasonable relationship to the public health, safety, morals, or general welfare.

39. The Defendants (other than Erpenbeck) have adopted procedures inconsistent with the Zoning Order and/or applied the Zoning Order in such a manner as to deny Vesper the reasonable and proper use of the Zoned Parcel. These procedures included but were not limited to:

(a) misapplication of the PD Planned Development Overlay Zone designation; and/or

(b) failure to make findings as required by §1506 of the Zoning Order.

40. Vesper had exhausted all available and reasonable administrative remedies and/or appeals, and any other remedies, if any, would be unduly burdensome on Vesper or unreasonable.

41. The restrictions, limitations and procedures imposed by the Defendants, other than the Erpenbecks, upon the use of the Zoned Parcel through the Zoning Order and its interpretation:

(a) bear no reasonable relationship to the public health, safety, morals, or general welfare, and are in excess of the legislative and regulatory power of the Fiscal Court and the Commission; and

(b) are improper, invalid, and contrary to law as applied; and

(c) are unreasonable, arbitrary, and confiscatory, and, therefore, unconstitutional.

42. The actions of the Fiscal Court in adopting Article 15 of the Zoning Order as interpreted by the Commission and the Fiscal Court in its use of PD Overlay Zoning is contrary to and not authorized by the Zoning Enabling Legislation and is thereby an abuse of the powers of the Fiscal Court, unreasonable and arbitrary.

43. The action of the Fiscal Court and the Commission and its Commission members in denying the request of the Erpenbecks for use of the Zoned Parcel:

(a) is not supported by substantial evidence, but is clearly erroneous based on reliable, probative, and material evidence in the records; and

(b) was based on matters which were irrelevant, immaterial, nonsupportive, and as such, were insufficient for denial, and thereby constituted arbitrary and capricious action on the part of the offending Defendants.

44. The rights of Vesper are affected and continue to be affected by the Zoning Order as interpreted and applied by the Fiscal Court, Fiscal Court members, Commission, and Commission members in such a manner as to seriously injure and affect the property rights of Vesper, to wit:

(a) Offending Defendants are exercising unconditional and unfettered discretion as to what type of development may occur on the Zoned Parcel; and/or

(b) Offending Defendants are applying and interpreting the various conditions, requirements, and recommendations of the Zoning Order in such a manner to arbitrarily and capriciously deny requests for development of the Zoned Parcel.

45. The Project submitted to the Commission and Fiscal Court by Erpenbeck was, in fact, wholly consistent with the Zoning Order.

V. Relief Sought

Appellant-Plaintiffs demand:

A.) The Court declare the denial of the use of the Zoned Parcel as proposed in the Project by Erpenbeck and the restrictions and limitations imposed by the Fiscal Court and Commission upon the Zoned Parcel are unreasonable, arbitrary, confiscatory, and not reasonably

related to the public health, safety, morals, and general welfare, and therefore, are unconstitutional and invalid;

B.) The Court declare that the placing of the "PD" Planned Development district overlay zoning on the Zoned Parcel was inconsistent with the Zoning Order, and that Article 15 of the Zoning Order has no application to the Zoned Parcel or in the alternative as applied to the Vesper property is unconstitutional and void;

C.) The Court declare that the findings of the Commission and Fiscal Court in denying the use of the Zoned Parcel as requested by the Project filed by Erpenbeck were not in accord with the mandates of the Zoning Order for review of such Project and thus was null and void;

D.) The Court declares that the Fiscal Court and Commission's action in denying the reasonable use of the Zoned Parcel and/or in not authorizing the reasonable use thereof, constituted a gross abuse of discretion and are contrary to the law; and

E.) The Court declares that the Project proposed by Erpenbeck is a reasonable and proper use of the Zoned Parcel, and therefore, is permitted;

F.) The Court declare that the actions of the Defendants constitute the causes of action hereinafter set out in the Second through the Sixth Causes of Action; and

G.) The Court awards Plaintiffs the costs of the is Court and this litigation and reasonable attorney fees; and

H.) The Court award Plaintiff all further relief, legal and equitable, to which Plaintiff may be entitled.

SECOND CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT (INVERSE CONDEMNATION)

46. The Plaintiff repeats and realleges the allegations of the previous paragraphs and incorporates same as if written herein.

47. The acts or actions of the Defendants, and each of them, previously referred to herein (except Erpenbeck) were the acts taken by agents and employees of the Fiscal Court.

48. All such acts by agents and employees were taken by such agents and employees acting in their official capacities or acting under color of laws and in accordance with official policy, custom and practice of the Fiscal Court.

49. This cause being against the Fiscal Court, the funds and property held in the name of Boone County, Kentucky, or the Fiscal Court will be subject to execution as a result of any award to Vesper in this action.

50. Under this cause of action, Vesper does not seek an award that would result in subjecting to execution the funds or property held in the names of individual Defendants other than Boone County, Kentucky, or its Fiscal Court.

51. The action of the Defendant, Fiscal Court, in denying the use of Plaintiffs' Zoned Parcel was without authority and in violation of the Fifth and Fourteenth

Amendment of the United States Constitution and sections 1(5), 2, 3, 13, 14, 59 and 242 of the Constitution of the Commonwealth of Kentucky.

52. As a result of the unauthorized taking of an interest in Plaintiffs' property, a right has accrued to Plaintiff for recovery from the Defendant, Fiscal Court, of just compensation of the interest taken from the date in which that taking was affected, February 6, 1990.

THIRD CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT (STATUTORY VIOLATION)

53. Plaintiff repeats and realleges the allegations of all paragraphs and incorporates same as if written herein.

54. The action of the Defendant, Fiscal Court, in adopting, interpreting and/or enforcing the Zoning Order is inconsistent with the provision of the Zoning Enabling Legislation and Sections 1(5), 2, 3, 13, 14, 59 and 242 of the Kentucky Constitution and has caused Plaintiff to suffer damages for which recovery is provided under K.R.S. 446.070.

FOURTH CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT (INTERFERENCE WITH CONTRACTUAL RELATIONS)

55. Plaintiff repeats and realleges the allegations of all paragraphs and incorporates same as if written herein.

56. Vesper had agreed to sell the Zoned Parcel and the adjoining tract of land to Erpenbeck and Erpenbeck

had agreed to purchase the Zoned Parcel and the adjoining tract of land. This contract was known to the Defendants.

57. As a direct result of the Defendants' refusal to timely allow the use of the Zoned Parcel, Erpenbeck has cancelled the agreement to purchase the Zoned Parcel and the adjoining tract of land.

58. Certain agents of the Fiscal Court have intentionally and improperly engaged in conduct in their official capacity to cause Erpenbeck not to complete this contract. The conduct and acts of the Fiscal Court and its agents were without justification, contrary to legal requirements, and in excess of and an abuse of their authority.

59. As a result, Vesper has lost the benefit of its bargain and Vesper has been damaged in an amount as not yet determined.

FIFTH CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT
(42 U.S.C. §1983 and §1988)

60. Plaintiff repeats and realleges the allegations of all paragraphs and incorporates same as if written herein.

61. The Defendants' action referred to herein (other than Erpenbeck) are in violation of the Fifth and Fourteenth Amendments of the Constitution of the United

States in that they constitute a taking of Vesper's property without just compensation and deprivation of Vesper's property without substantive or procedural due process of law.

62. The Defendants taking and deprivation of Vesper's property caused Vesper substantial loss and damage. Included in such loss and damage are the diminution in the value of the property by the taking, even if deemed temporary.

63. Vesper is entitled to recover its loss and damages from the Fiscal Court pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1988, and their reasonable attorney's fees pursuant to 42 U.S.C. §1988.

SIXTH CAUSE OF ACTION IN THE ALTERNATIVE SEEKING AN AWARD OF MONETARY DAMAGES OF THE FISCAL COURT MEMBERS AND COMMISSION MEMBERS (ACTION IN THE ALTERNATIVE TO FIFTH CAUSE OF ACTION)

64. Plaintiff repeats and realleges the allegations of all paragraphs and incorporates same as if written herein.

65. This cause of action is in the alternative to the Second, Third, Fourth and Fifth Causes of Action and only advanced if the Fiscal Court denies the allegations of paragraphs 47 and 48 above, or offers an affirmative defense discharging the Fiscal Court from liability for the acts of the Fiscal Court Members or Commission members or other agents of the Fiscal Court which would not be available to such members.

66. The actions of the Fiscal Court Members and/or Commission Members were taken by such Defendants acting in their official capacities and acting under color or law, but said actions were not taken pursuant to official policy, custom or practice of Boone County, Kentucky or its Fiscal Court.

67. The acts or actions of the Fiscal Court Members of Commission Members were taken negligently or willfully in the real or feigned belief that same were in accordance with the official policy, custom or practice of Boone County, Kentucky, or its Fiscal or the Commission.

68. The illegality of the Fiscal Court Members or Commission Members' actions are clearly established and such illegality was known or should have been known to them at the time the actions were taken.

69. The Fiscal Court Members or Commission Members are jointly and severally liable to Vesper on the preceding causes of action.

70. Vesper seeks a judgment which would subject the funds and property held in the name of the Fiscal Court Members or Commission Members to execution.

WHEREFORE, the Plaintiff demands:

A) Judgment for the Plaintiff against Boone County Fiscal Court for the loss, damage and expense in an amount as not yet determined but in excess of the minimal jurisdiction of this Court.

B) For interest at the lawful rate from the date of loss, damage or expenses until judgment is paid.

C) In the alternative, judgment against the individual Fiscal Court Members and Commission Members under the Sixth Cause of Action in an amount as not yet determined.

D) Recovery of costs and attorney fees and for all other relief to which it is entitled.

E) For trial by jury on the issues presented in this cause of action.

/s/ Paul J. Vesper
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Attorney for Appellant/Plaintiffs

CERTIFICATION

I hereby certify that a true and correct copy of the foregoing Amended Complaint was served upon Dale Wilson, Attorney for Boone County Planning Commission and its Members, 7699 Tanners Lane, Florence, KY 41042; Larry Crigler, Attorney for Boone Bounty Fiscal Court and its Members, 2995 Washington, Burlington, KY 41005; Thomas R. Nienabor, Attorney for Erpenbeck, P.O. Box 6910, Florence, KY 41042; and to Alex Talbott, 2100 First National Tower, 101 S. Fifth Street, Louisville, KY 40202-3129, on this the ___ day of May, 1991, by ordinary United States Mail, first-class, postage prepaid.

/s/ Paul J. Vesper
PAUL J. VESPER

* * *

[p. 22] property?

A. I don't believe those come to us for our action.

Q. When you used the term earlier, "if it's recommended to us", what were you just talking about? What would come to you on a recommendation basis? Do you know?

A. If there is certainly, an object of the planned development overlay is that that particular design come to us for approval.

Q. All right. So when you were talking about recommendation, you were thinking ahead to a P. D. situation?

A. Correct.

Q. So my specific question to you earlier, if a piece of property is zoned C-2 and the proposed use of it is a principally permitted use, doesn't require a zone change, doesn't require a variance, or anything else, would that use come to the Fiscal Court for action? And your answer would be?

A. No.

Q. Now if a person wants to a use a piece of property that's zoned P.D., are there any principally permitted uses in the Boone County planning ordinance, [p. 23] excuse me, in the Boone County ordinance?

A. No.

Q. Can a P. D. zone under the Boone County ordinance stand by itself?

A. Okay, I've never had a P.D. zone come to us. Every P.D. zone comes, whatever is requested of a P.D. zone comes to the Court for approval.

Q. All right. Here's my question though. You testified earlier that C-2 is a zoning district in Boone County.

A. Yes.

Q. You also testified that P.D. is a zoning district in Boone County.

A. I'm not confident saying yes to that as a zoning district.

Q. Okay. Lets see if your zoning ordinance helps us.

A. I'm trying to think of maps where the simple designation is planned development. In the City of Union I can think of spot there that it is.

Q. Did I miss the point to you? You said, –

A. Your question was, does it stand on its own as a planned development.

[p. 24] Q. Right. Have you ever remembered an occasion where the zoning map, in adopting the zoning map for Boone County a parcel of land simply had the designation P.D.?

A. To my recollections are like small community planned development. I'm hard pressed to advise that planned development stands on its own.

Q. So then it is your understanding of the zoning ordinance that a piece of property could not be zoned just P.D.?

A. I'd have to defer for lack of knowledge on that.

Q. Okay. Let me show you zoning ordinance, Article 5, Section 5.20 it's called, "District Identification". "For the purposes of this Order, the Cities of Florence, Union, Walton and Boone County are hereby divided into the following categories of zoning districts." And it does show a C-2.

A. Yes.

Q. And it also shows a P.D.; am I correct?

A. I see that, yes.

Q. Now, not to mislead you, the P.D. has a definition, has a designation of the name of the district and it's called planned development overlay.

[p. 25] A. Yes.

Q. So, there's, is there such a thing though as a P.D. zone in the Boone County ordinance?

A. I'd have to admit, I have no knowledge of it standing on its own.

Q. C-2 is a zoning district in Boone County that does stands by itself.

A. Correct.

Q. So as the Boone County Fiscal Court interprets its zoning ordinance, P.D. is not a separate individual zone.

A. I would view it with that interpretation, yes.

Q. So if a piece of property was zoned simply P.D., that would first be a violation of the ordinance; am I correct?

A. I could not comment on that; I would not know.

Q. If a piece of property has a P.D. zone on it in Boone County, –

A. Yes.

Q. What are its uses?

A. My association with a P.D. zone as an overlay or an attachment to the zone. I don't see it [p. 26] free standing?

Q. All right. Well lets [sic] go back and ask this question. What was the designation of the parcel that is the subject of this litigation again?

A. C-2 P.D.

Q. Now let me direct you to Section 5-20 of the zoning ordinance.

A. Yes.

Q. Do you see a designation in the district identifications anywhere of a zone district called C-2 P.D.?

A. It's not printed in that form, no.

Q. All right. Well this section 5-20 does say that the Boone County is divided into the following categories of zoning districts and it enumerates them; am I correct?

A. Yes.

Q. And there's a C-2 and there's a separate one called a P.D. but there's no one called C-2 P.D.?

A. I see that, yes.

Q. And you'll agree with that statement?

A. I agree that it's not, the P.D. is defined as planned development overlay.

Q. And that's taken care of in Article 15?

[p. 27] A. Yes.

Q. So the parcel that's the subject of this litigation was zoned C-2 P.D.

A. That's my understanding.

Q. And it's in Boone County.

A. Yes.

Q. And you testified that the uses of a piece of property that's zoned C-2 are clearly specified in Article 9?

A. Correct.

Q. And you didn't find any uses of a piece of property in the Boone County zoning district when it's defined P.D?

A. Correct.

Q. Now, when I combine the two zones and call it C-2 P.D., what is the uses permitted by the Boone County Fiscal Court by its ordinance in that property?

A. It's uses would be those that conform to C-2 with the considerations that are requested under planned development.

Q. Now, I'm going to use those terms if I can. I got to write that down because I'm going to come back to that frequently. I think's that, in fact, I want it so specific, would you tell me what that was again he [p. 28] said?

(THE REQUESTED PORTION OF THE RECORD WAS READ BY THE REPORTER.)

Now, I'm going to ask you in light of your answer to go to Article 15 or anywhere else in the zoning ordinance and specify with me, for me if you can what the considerations are that are requested by the P.D. in that Article?

A. Well, there are a number of matters for consideration.

Q. All Right.

A. Which are outlined here.

Q. That's, you're answering the question to you can answer it any way your comfortable. When you testified that they must conform to the considerations that are requested by the P.D.?

A. Yes.

Q. If you can enumerate them for me, that's fine. If you can't, that's an answer also. Whatever you want to tell me constitutes considerations that are requested?

A. The considerations I believe are adequately listed in Article 15. All I would be doing for you is reading those.

[p. 29] Q. Okay. Is it the entire Article 15 or is it specific or when you adopted the ordinance you broke it down into sections?

A. Um-hum.

Q. Is it a specific section or what?

A. No. I would say it's everything embodied in there that would be applicable to this particular piece of property.

Q. Okay. Including Section Number 1500 on intent?

A. Yes.

Q. So anything that's in here?

A. Yes.

Q. Now if a piece of property in Boone County is zoned C-2 P. D., can they use that property without reference to Article 15?

A. No; my consideration, no.

Q. If a piece of property in Boone County is zoned C-2 P.D. and they only want to use the uses in Boone County under this ordinance which are permitted under Article 9, Section 9-20, can they use the property for those uses?

A. Restate please.

Q. I will. A piece of property in Boone [p. 30] County under this ordinance at this time is zoned C-2 P.D. but the applicant only chooses to use the property for the uses specified in Article 9 with reference to C-2, may they use the property for that purpose?

A. Not without the consideration of the planned development being applied to it.

Q. Okay. A piece of property in Boone County is zoned C-2 P.D. under the current zoning ordinance therefore would you agree with this statement, has no principally permitted use without further action from the Boone Fiscal Court?

A. Yes.

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